SHAMBERG JOHNSON AND BERGMAN

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IN THIS ISSUE

FEATURE ARTICLE

BACK TREATMENT RESULTS IN RARE PLAINTIFF'S VERDICT

Epidural steroid injections to treat lower back pain resulted in bacterial meningitis, a crippling nerve injury, and a $2.88 million verdict in conservative Johnson County, Kan. The case began as a personal injury claim but converted to a wrongful death claim after the client committed suicide and left a note saying he could no longer stand the pain that resulted from the infection.

Scott Nutter, John Parisi, and Daniel Singer handled the claim on behalf of Joel Burnette, who died at 40, and his surviving parents. Joel was not married and had no children.

In January 2009, Joel received an epidural steroid injection from Dr. Kimber L. Eubanks of Pain CARE P.A., a Johnson County pain management clinic. During the following week, Joel developed a lump at the site of the injection. He testified in deposition that he returned to Pain CARE and told a nurse about the lump. The nurse told him it was "no big deal." Joel received another injection at that visit. Plaintiffs claimed the needle passed through the lump at that time, carrying the bacterial infection to the spinal cord. Medical records said nothing about a possible infection but indicated the subsequent injection only took three minutes from the time Joel walked into the room until he walked out.

Dr. Eubanks and his staff denied that there was a lump or any abnormality on Joel's back during the procedure. Although they maintained there was zero chance that they did so, they and their experts agreed that it would violate the standard of care to perform a steroid injection in the face of any sign or symptom of an infection.

Following the subsequent injection, Joel developed an epidural abscess, deep tis-

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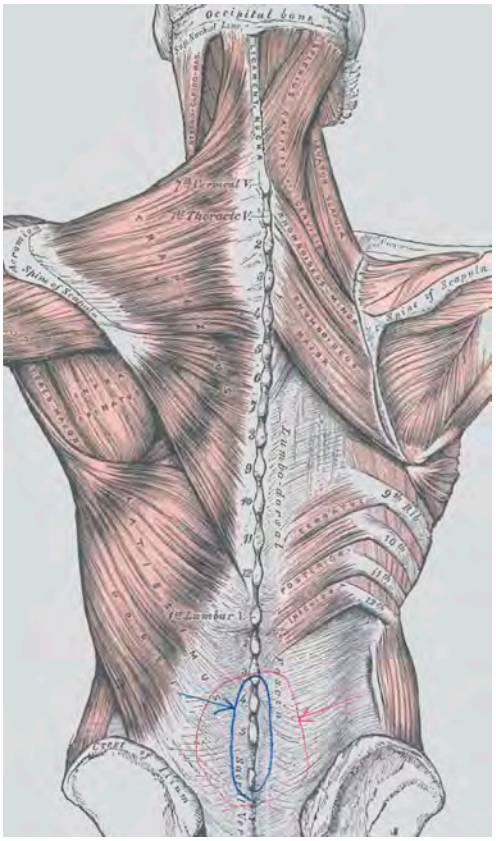

A trial exhibit showed the locations of swelling during epidural steroid injections.

WELCOME

SHAMBERG JOHNSON AND BERGMAN

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Our goal is to maximize results for you and your client.

We welcome you to the first Shamberg, Johnson & Bergman newsletter using our redesigned layout and updated logo. The appearance of our newsletter has changed. But our accomplishments, effort, dedication to the profession, and commitment to clients remain the same as they have been for more than 60 years. Thank you for your interest in our firm.

Continued from previous page

sue infection, and MRSA meningitis. Because of the extent of the infection adjacent to his spinal cord, he was diagnosed with arachnoiditis/cauda equina syndrome, which left him disabled from near constant spine and leg pain, difficulty with ambulation, and loss of bowel and bladder control.

In February of 2013, unable to endure the constant physical and emotional pain, Joel took his own life. We brought a wrongful death case on behalf of Joel's parents as well as a survival action on behalf of Joel's estate against Dr. Eubanks and Pain CARE.

Joel had been diagnosed with bipolar disorder as a young adult. The defendants argued that Joel's suicide had nothing to do with the lumbar injections or Joel's injuries. The jury disagreed, finding that the lumbar injuries and disability caused Joel's suicide.

Defendants initially alleged Joel was at fault for not informing the doctor and staff of the lump on his back prior to the second injection. But defendants withdrew this claim at trial, arguing there was nothing abnormal to report to the doctors, so Joel could not be at fault for not reporting it. The defendants never offered to settle the case.

The jury deliberated more than two days before finding for the plaintiffs. Most of the $2.88 million went to Joel's estate for his personal injuries. The jury assessed 75 percent of the fault to Dr. Eubanks and 25 percent to Pain CARE staff. Significantly, for Joel's medical bills, the jury awarded the plaintiffs the full billed amount, rather than the lesser amount paid to satisfy the bills. Additionally, the jury awarded $550,000.00 in Wentling damages, which compensate the surviving parents for their loss, loss of Joel's attention and care, and their loss of a complete family.

The verdict is the largest plaintiff's medical negligence verdict in Johnson County since the 1980s, when Victor Bergman obtained verdicts of $1.7 million and $15 million.

01

PARTY BUS DEATH EXPOSES SAFETY, INSURANCE FLAWS

A wheelchair-accesible bus converted into a party bus caused the tragic death of a young mother and exposed safety shortcomings in the industry, including the failure to procure mandatory liability insurance.

In May 2013, the young mother was riding in a party bus on Interstate 35 in Wyandotte County for a friend's bachelorette party. She had given birth to her first child that March. The bus had been purchased by the owners of a landscape company and converted into a party bus, initially for use with friends on the weekend. As the bus's popularity grew, the owners began receiving requests to use the bus for parties, and a small side business was born through an LLC formed separate from the landscape business.

The owners did not know that several state and federal safety regulations applied to the bus, specifically to the interstate transportation of for-hire passengers. The owners asked an insurance agent who had assisted their landscape business to recommend and obtain liability coverage for the bus. Even though federal regulations required $5 million in coverage for the bus, based on its designed passenger capacity, the insurance agent suggested that the owners only obtain $1 million for the bus.

During conversion from a wheelchair-accessible vehicle to a party bus, the owners removed a wheelchair lift that unfolded from two double doors on the right rear side of the bus. With the wheelchair lift in place, the doors had been designed to open, close and lock from the outside. Once the wheelchair lift was removed, operators and passengers of the party bus began opening and closing the door from the inside, which weakened the doors' fastening mechanism.

On May 4, 2013, the young mother was standing near the double rear doors as the bus travelled north toward Kansas City, Mo. On a curve along Interstate 35, the double doors flew open, and Ms. Frecks was sucked from the bus. She died from injuries in the fall.

Lynn Johnson and David Morantz pursued a wrongful death claim in Wyandotte County, Kan., on behalf of the woman's young daughter against the bus company. They also named the landscape company as a defendant, alleging that the two companies were so closely related to form a joint venture. Discovery focused on how the double rear doors were originally designed, with the wheelchair lift serving as a safety barrier for passengers, should the doors come open. The bus LLC offered its $1 million in coverage early in litigation. But discovery continued and focused on the connected operations of the bus LLC and the landscape company.

TOP: An outside view before the bus was converted shows the wheelchair ramp folded up. BOTTOM: During conversion, the ramp was removed from the area in front of the double doors at the back left of this photo.

Following significant discovery into the bus's design and the landscape company's motor carrier operations, the insurer for the landscape company offered its $4 million policy limits, which plaintiff accepted. We then obtained wrongful death and survival judgments of more than $6.7 million against the bus LLC through an evidentiary hearing. The LLC's $1 million in coverage was accepted in partial satisfaction of the judgment, leaving an unpaid judgment of more than $5.7 million.

Through an agreement with the young girl's family, the bus LLC sued the insurance agency and a company that had helped obtain the $1 million coverage. The LLC alleged that the agency and company should have recommended and obtained $5 million in coverage not $1 million. The LLC agreed to assign proceeds from the suit toward satisfaction of the remaining unpaid judgment in the underlying case.

The insurance agency settled the claim for its $2 million policy limits, bringing the total amount recovered in litigation connected to the May 2013 incident to $7 million. The suit continues against the separate company that helped obtain the $1 million policy.

02

RURAL JURY AWARDS PLAINTIFF AFTER ANKLE SURGERY

While at a yard sale, our client, a 66-year-old woman, stepped in a hole and broke her left ankle. She was taken to the emergency room at Northeast Regional Medical Center in Kirksville, Mo. It was a Saturday morning, and the defendant orthopedic surgeon was on call.

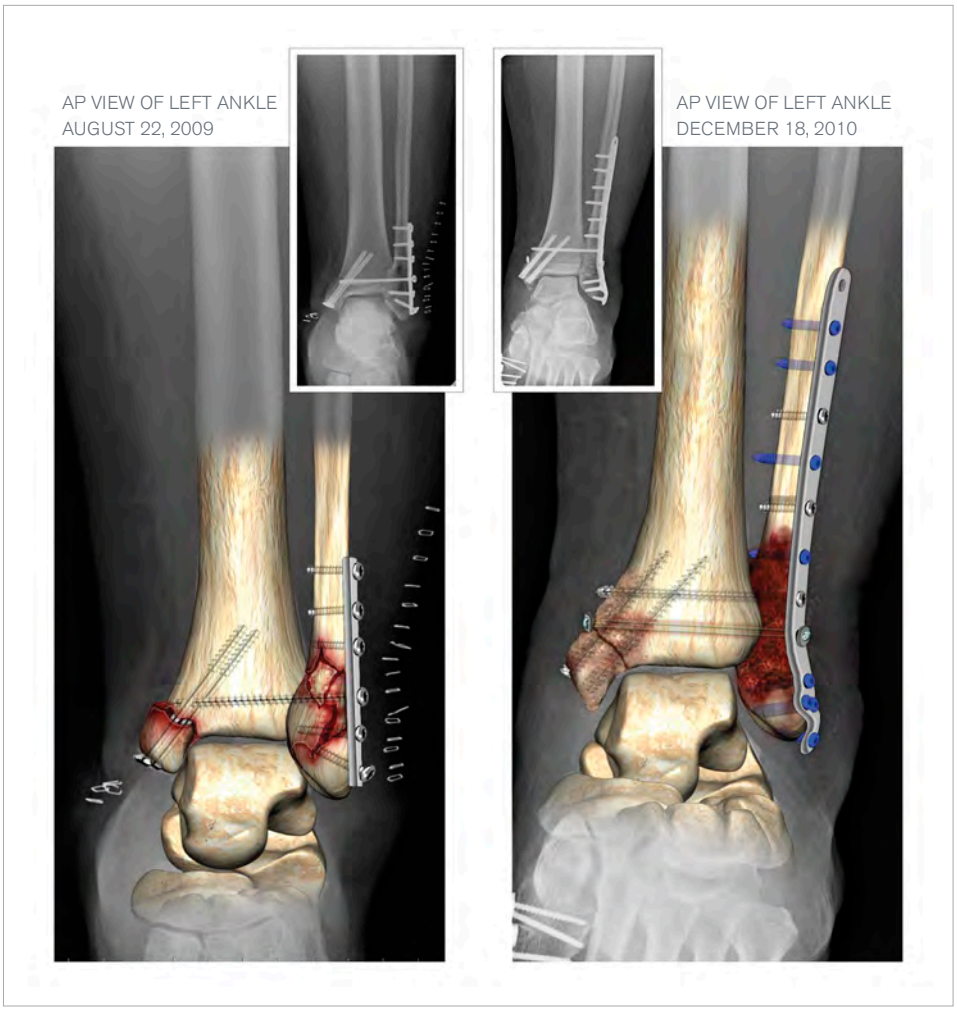
The defendant performed an open reduction internal fixation surgery to attempt to repair ankle fractures. But the fractures did not heal properly, and the fixation hardware placed by the defendant failed. Our client required a corrective surgery to remove the old hardware and to place new fixation devices and bone grafts. An orthopedic surgeon with a different practice group performed the corrective surgery.

Scott Nutter and Daniel Singer brought suit in Adair County, Mo., against the first orthopedic surgeon, claiming he failed to properly align and fixate the ankle fractures, which prevented healing and required corrective surgery. Specifically, evidence showed that the defendant did not properly align the bones to their normal position and failed to provide rigid and stable fixation of the plate and screws.

When the second orthopedic surgeon performed the corrective surgery, he found that three of the five screws had completely pulled out of the bone and that the plate was not securely attached. He also found several areas of malalignment of the fracture sites causing pain and instability. Our client now has daily pain in her ankle and walks with a limp.

The defendant claimed he met the standard of care and that the fixation devices remained rigidly attached. He claimed our client's 46-year history of smoking two packs a day prevented the fractures from healing correctly. He also claimed he had advised our client to quit smoking, and she had failed to do so. The defendant never offered to settle the case.

The case was tried for four days in Kirksville. Of note, the second surgeon appeared as an expert witness in plaintiff's case-in-chief and also as a rebuttal witness to counter the defendant's claim that the client's ankle nonunion arose after and not because of the defendant's care. Because the second surgeon



An exhibit created for trial depicted surgical hardware inserted during the first ankle procedure with the more thorough, shaped hardware inserted during the repair procedure.

was scheduled for surgery during his rebuttal testimony, he testified via FaceTime from his hospital while wearing his surgical gown.

The jury found the defendant negligent and assigned him 78% of the fault, with 22% of the fault to our client for smoking. The jury then awarded damages in the amount of $263,428.47. The verdict is believed to be only the third plaintiff's medical negligence verdict ever in Adair County.

03

NONECONOMIC DAMAGES MAKE UP BULK OF RECOVERY FOR NERVE DAMAGE

Middle-ear surgery left our client with a severe facial nerve injury. The Platte County, Mo., case, handled by Vic Bergman and Daniel Singer, recently settled for $1.7 million, with almost all of the settlement representing noneconomic damages.

Our client, an active 75-year-old woman, first saw the defendant doctor in the 1980s, at which time he implanted an ossicular prosthetic to restore her hearing. In late 2012, she returned to the defendant with complaints of vertigo. The defendant, whom our firm has sued before, recommended surgery with replacement of the old prosthetic to restore hearing.

During the procedure, the defendant unknowingly cut a portion of our client's facial nerve, which controls muscle movement in the face. In the recovery room, our client immediately presented with facial droop and weakness, a telltale sign of injury to the facial nerve.

Despite being advised of these symptoms, the defendant failed to diagnose the injury and did not order any monitoring or follow-up.

Injury to the facial nerve is a well-known risk that surgeons are supposed to avoid. Surgeons who do the procedure follow the axiom that "surgery of the ear is surgery of the facial nerve." Established techniques prevent such injury. But none were used in this case. The safest method utilizes a facial nerve monitor, a set of sensitive electrodes that tells the surgeon when the nerve is at risk.

Our experts were highly critical of the defendant's failure to use a facial nerve monitor. If a facial nerve monitor is not used, the surgeon must identify and avoid contact with the nerve. The defendant's operative note made no reference to identification of the nerve or any effort to steer clear of it.

Days later, our client received follow-up care from another surgeon, who evaluated the injured nerve. He documented injury to 76.8% of the diameter of the facial nerve, clearly caused during the first surgery. Because of the extent of injury, it was impossible to restore the nerve to full function.

As a result, our client has pronounced facial droop. Her appearance is distorted. Her eye does not blink reflexively, resulting in dryness, burning, and general discomfort. Her speech is altered. Her vision is impaired. She has trouble eating and drinking. She is uncomfortable being around strangers, and perhaps most upsetting, she cannot pucker her lips, which means she has not kissed her husband since she was injured. All these injuries are permanent. According to the second surgeon, she also lost a roughly 75% chance to have

Continued on next page

ANNOUNCEMENT

RICHARD BUDDEN JOINS FIRM

Richard Budden

The firm is pleased to announce the addition of Richard Budden. Richard joined the firm last year after completing a two-year clerkship with the Hon. J. Thomas Marten, Chief Judge of the U.S. District Court for the District of Kansas.

Richard graduated with honors from Washburn University School of Law, where he was a published student author and the executive editor for the Washburn Law Journal. He was recognized as the top student in five classes and was a John Shamberg Scholar and a Weigand Scholar. Previously, Richard earned his undergraduate degree in accounting and management from Washburn University, graduating with a perfect grade point average.

Richard is licensed to practice in Kansas and Missouri. He focuses his practice on medical negligence, automobile accidents, product liability and bad faith insurance litigation.

Continued from previous page

her hearing restored had the surgery been performed properly.

Her medical bills totaled $85,000, of which $20,000 was paid. Treatment cannot reverse her injuries. The damages were therefore almost entirely noneconomic. This case was filed after Missouri's previous cap on noneconomic damages in medical negligence cases was held unconstitutional and before the new cap took effect.

The obvious nature of the defendant's negligence, combined with the profound noneconomic impact on our client's quality of life, resulted in a substantial settlement of $1.7 million.

ANSWERS TO ROYALS TRIVIA PUZZLER:

ACROSS: *2) Municipal 5) Houser 6) Biancaiana 7) Harvey 9) Toronto 10) Denkinger 12) Fountains 16) Philadelphia 17) Athletics 18) Hamelin 19) Montgomery*

DOWN: *1) Leonard 3) Cocaine 4) Pine 8) Aoki 9) Turf 11) Robinson 13) American 14) Tequila 15) Taxpayer*

04

TRUCK COLLISION CAUSES BAD FAITH INSURANCE CLAIM

Our client was paralyzed when a tractor-trailer slammed into the back of her car on a southwest Kansas highway. Despite the clear liability and terrible injuries, the insurance company refused to provide coverage information.

A clear liability trucking collision that left a 42-year-old woman paralyzed evolved into the latest insurance bad faith claim handled by Shamberg, Johnson & Bergman, Chtd.

Our client was waiting to make a left turn off of a highway in southwest Kansas when a TLC Trucking tractor-trailer slammed into the back of her car at highway speed. Investigation revealed the truck driver was speeding and talking on his CB radio. By all appearances, it was a "slam dunk" liability case with catastrophic injuries.

Scott Nutter represented the woman and her family. He asked the liability carrier for TLC Trucking, Star Insurance, to provide its policy limits and to advise whether TLC had excess coverage. Star refused, despite having the insureds permission to provide coverage information. Star also made no effort to settle the case.

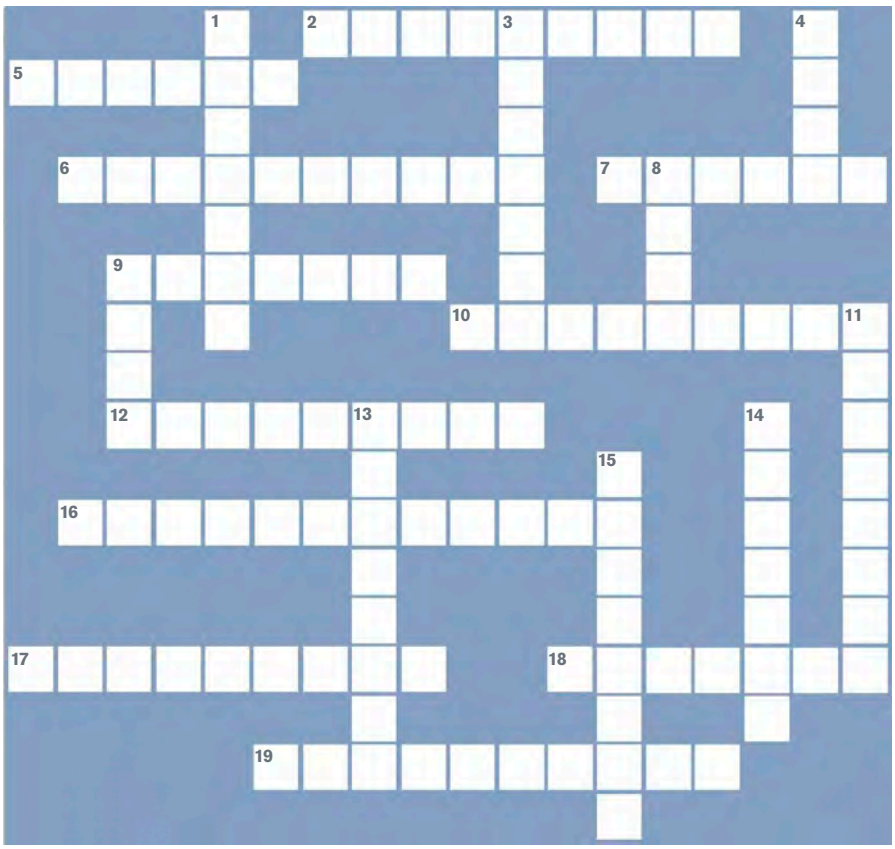
Nutter filed suit against TLC and its driver in Grant County, Kan. The truck had policy limits of $1 million and no excess coverage. A *Glenn v. Flemming* agreement was reached under which defendants assigned their claims against Star Insurance to plaintiffs in exchange for a covenant not to execute beyond insurance coverage on any judgment. The case proceeded to a bench trial before the Hon. Bradley Ambrosier.

Star instructed counsel for TLC to contest the trial and to make all available arguments in an attempt to limit the damages. The trial lasted a full day. Plaintiffs' experts appeared by videotaped deposition. The plaintiffs and two family members testified live. Plaintiffs' claimed damages totaled $10.6 million.

Defense counsel cross-examined plaintiffs' witnesses and presented evidence from a vocational expert and life care planner. Defendants argued the Court should limit the damages award to $3.6 Million. The Court deliberated for approximately 30 days before awarding plaintiffs $10,482,974.60.

Plaintiffs then filed a breach of contract and bad faith case against Star and others to collect the judgment. The case is currently pending in Grant County and is another example of an insurance company refusing to provide policy information, failing to promptly attempt settlement of a clear excess case, and exposing its insured to an excess judgment.

ROYALS TRIVIA



ACROSS

2. In 1973, the Royals moved from _____ Stadium to Royals (now Kauffman) Stadium.

5. Yankees Manager Dick _____ was fired following the 1980 American League Championship Series before leading the Royals to the 1985 championship.

6. After shortstop Onix Concepcion was benched September 20, 1985, Buddy _____ started 13 of the next 15 games and all 14 post-season games for the Royals.

7. Former first baseman and designated hitter Ken _____ once threw a ball into the face of pitcher Jason Grimsley while trying to make a play at the plate.

9. Kansas City topped _____ in the 1985 American League Championship Series (city).

10. Had replay review existed in 1985, few would remember the missed but brilliant call by first base umpire Don _____ in Game 6 of the World Series.

12. Kauffman Stadium's outfield _____ were originally designed to appear (and still appear, after renovations) in the shape of a number one.

16. Game 6 of the 1980 World Series between Kansas City and _____ remains the most-watched game in World Series history.

17. The Philadelphia _____ moved to Kansas City in 1955 before relocating to Oakland 13 years later.

18. Royals Rookie of the Year winners include Lou Piniella, Carlos Beltran, Angel Berroa and Bob _____.

19. In 1990, Jeff _____ became the only Royal and the 23rd pitcher in major league history to strike out three batters on nine pitches in one inning.

DOWN

1. The four winningest pitchers in Royals history are Paul Splittorff, Dennis _____, Mark Gubicza and Bret Saberhagen.

3. In 1983, Willie Aiken, Vida Blue, Jerry Martin and Willie Wilson were arrested for attempting to purchase _____.

4. Umpire Tim McClelland determined in 2003 that Sam Sosa's bat was corked and determined in 1983 that George Brett's bat had too much ____ tar on it.

8. This 2014 outfielder was known for taking circuitous routes to catch fly balls.

9. The 1980 World Series was the first to be played entirely on ____.

11. Allard Baird replaced Herk _____ as Royals general manager in 2000.

13. Rather than castles, kings or queens, the Kansas City Royals are named after the _____ Royal livestock show.

14. Following a 10-18 start in 2001, Royals Manager Tony Muser said he'd prefer his players to "go out and pound _____" rather than "chewing on cookies and drinking milk and praying."

15. Ewing Kauffman never demanded _____ subsidies in exchange for keeping the Royals in Kansas City.

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